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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

JANE DOE, *et al.*,

Petitioners,

—against—

PETER BRENNAN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 1, 1973.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and is set out in the Appendix, *infra* at pp. 1a-7a. The opinion of the District Court is reported at 344 F. Supp. 964 (S.D.N.Y. 1972) and is set out in the Appendix, *infra* at pp. 8a-14a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1973. On May 17, 1973, the Court of Appeals denied petitioners' motion for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the systematic exclusion of migrant agricultural workers from the protections of the National Labor Relations Act, the Federal Employment Insurance Tax Act, the Social Security Act, the Fair Labor Standards Act, the New York State Unemployment Insurance Act, the New York State Labor Relations Act, the New York State Minimum Wage Act and the New York State Workmen's Compensation Law raise a substantial constitutional question requiring consideration by a three judge District Court?

2. Whether the summary affirmance by this Court in *Romero* v. *Hodgson*, 403 U.S. 901 (1971) of the 2-1 decision of a three judge District Court sustaining the agricultural exemption from the Federal Unemployment Insurance Tax Act precludes further consideration by the Federal courts of contentions by migrant agricultural laborers that their systematic exclusion from virtually the entire body of ameliorative social legislation denies them equal protection of the laws?

Statement of the Case

This is an appeal from the refusal by one Court of Appeals to convene a three judge District Court to hear and determine petitioners' contention that the systematic exclusion of migrant agricultural laborers from the protection of the National Labor Relations Act;[1] the Federal Unemployment Insurance Act;[2] the Fair Labor Standards Act;[3] the Social Security Act;[4] (and other New York State analogues) and the New York State Workmen's Compen-

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[1] The agricultural exclusion from the National Labor Relations Act is found at 29 U.S.C. 152(3). Agricultural workers are also excluded from the "Little Wagner Acts" enacted by the various states. Only in Hawaii, Michigan and the Commonwealth of Puerto Rico do agricultural employees possess meaningful collective bargaining rights. See, *Local Union No. 300, Amalgamated Meat Cutters* v. *McCulloch*, 428 F.2d 396 (5th Cir. 1970).

[2] The agricultural exclusion from the Federal Unemployment Insurance Tax Act occurs at 26 U.S.C. 33306 (c)(1). Only Hawaii has provided for unemployment compensation for agricultural workers.

[3] Agricultural workers were totally excluded from the Fair Labor Standards Act until 1966, when the Act was amended to cover approximately 5 percent of the agricultural labor force. 29 U.S.C. 203(f), 206(a)(5) and 213(a)(6). See, generally, 1969 Report of the Senate Subcommittee on Migratory Labor (Rep't No. 91-83, 91st Cong. First Session).

[4] The Social Security Act does not explicitly exclude farmworkers. However, a discriminatory qualification requirement, applicable only to farmworkers, effectively bars the vast bulk of the migrant work force. Title 42 U.S.C. 409(h)(2) requires that, in order to qualify for coverage, an agricultural worker must earn more than $150 in cash from a single employer during a calendar year. Since the nature of migrancy compels a rapid employer turnover, payments from a single employer to a migrant rarely exceed $150.

sation Law[5] denies migrant agricultural laborers the equal protection of the laws, and imposes unconstitutional impediments upon their freedom to associate and their right to travel.

Although both the District Court and the Court of Appeals expressed sympathy with the legal plight of migrant agricultural laborers and acknowledged that their legal claims were far from frivolous[6] each felt itself bound to deny petitioners' application for a three judge Court and to dismiss petitioners' complaint solely on the authority of this Court's summary affirmance in *Romero* v. *Hodgson,* 403 U.S. 901 (1971) of a 2-1 decision by a three judge Court in the Northern District of California sustaining the agricultural exemption from the Federal Unemployment Insurance Act. 319 F. Supp. 1201 (N.D. Cal. 1970).

Thus, the basic issue raised by this appeal is not the constitutionality of the systematic exclusion of migrant agricultural laborers from virtually all 20th Century social legislation, but rather whether this Court, by summarily affirming the decision of one divided three judge Court, involving an agricultural exemption from a single statute,

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[5] There currently exists a national Workmen's Compensation plan only for the longshore industry. Migrants are totally excluded from the bulk of state Workmen's Compensation laws. New York provides severely limited coverage. Workmen's Compensation Law, §201(6)(A).

[6] Both the District Court and the Court of Appeals indicated that each believed that petitioners' complaint raised serious constitutional issues. Indeed, the Court of Appeals stated:

> "Were we writing on a clean slate, we would take very seriously the assertion that on these facts the statutory exclusions cannot be sustained. But given *Romero,* the slate is not clean; plaintiffs must obtain any further writings on it in this case from the Supreme Court. Appendix, p. 7a.

has absolutely disabled the Federal judiciary from granting a hearing to any migrant challenging his or her exclusion from the entire body of social welfare legislation which shields the remainder of the American labor force from economic catastrophe and exploitation.

Petitioners are nine migrant agricultural laborers[7] whose lives continue to be blighted as a direct consequence of their systematic exclusion from the ameliorative social legislation at issue herein. With no collective bargaining rights, no unemployment insurance, diluted minimum wage-maximum hour protection, limited child labor protection, no Social Security coverage and no workmen's compensation protection, petitioners exist in a generational cycle of poverty and despair, causally related to their exclusion from the statutes at issue herein. Moreover, as a direct consequence of their powerlessness, petitioners are disabled from seeking redress through traditional political channels. It is an unfortunate reality that the political constituency of our migrant agricultural poor is non-existent. Only through the immutable guaranty of the Equal Protection clause can they hope to remedy their systematic exclusion from the mainstream of American life.

Petitioners are members of the Eastern migrant stream which flows from northern Florida, Louisiana and Arkansas, through Virginia and Maryland into New York,

[7] In order to shield petitioners from the very real danger of economic and physical reprisals, counsel has sought to prosecute this action by substituting pseudonyms for petitioners' actual names. At Judge Frankel's suggestion, a sealed version of the complaint was delivered to him in which the actual identities of the petitioners are recited. Consideration of the further disclosure of the real identities of petitioners has been deferred pending the outcome of the appellate process.

New Jersey and even Maine. As are virtually all migrants in the Eastern stream, petitioners are members of racial minorities. As the harvest cycle passes from citrus (Northern Florida) to apples (Virginia) to potatoes, cherries, apples, strawberries and truck farming (New York, New Jersey), petitioners travel from migrant camp to migrant camp to offer their labor to waiting farmers. Petitioners travel in groups of between 8-30, called crews. Each crew is led by a crew chief who, by dint of resourcefulness and sheer physical strength, assembles his crew and negotiates with growers to provide harvest labor at an agreed price. The crew chief transports his crew to the harvest area and houses them in a migrant labor camp owned by the farmer, but operated by the crew chief. Once established in a migrant camp, a worker is expected to eat his meals in a common mess hall in return for the payment of a weekly sum to his crew chief. In addition, each migrant is expected to pay a weekly rental for his or her dormitory space.

Each morning, the crew chief tranports the migrants to the harvest site to await the farmer's instructions. Once at the site, migrants are paid only for time actually worked, or on a piece work basis. Thus, when weather, machinery breakdown, crop failure or economic conditions make it impossible to continue the harvest, petitioners are simply not paid. During such slack periods (known as "down time"), fixed expenses for rent and food continue, creating a debt to the crew chief from which few migrants escape.

Despite lives of back-breaking labor, no petitioner has ever earned more than $3,000 in any year. Petitioners work approximately 20 hours of billable harvest time in an aver-

age week. Each owes fixed weekly expenses of approximately $20 for food and lodging and between $5-$10 additional expenses for such "luxuries" as canned soda with meals, the right to watch the crew chief's television set and a pint of wine. Thus, their weekly take-home pay in an average week at premium rates rarely exceeds ten dollars.

So brutal a system of wage peonage simply could not exist but for petitioners' systematic exclusion from the social welfare legislation virtually all Americans take for granted as their birthright. Indeed, it is a disturbing, but nonetheless accurate, observation that the squalor and degradation of a migrant's life is directly attributable to a conscious societal decision, reflected in the systematic exclusions at issue herein, to omit agricultural laborers from the economic model which characterizes the remainder of 20th Century America, and to abandon them to the vagaries of an unregulated employer-employee relationship reminiscent of the worst abuses of the Industrial Revolution. Whether such a conscious societal decision inevitably conflicts with the values and guarantees of the Equal Protection clause is what this case is all about.

REASONS FOR GRANTING THE WRIT

1.

Certiorari should be granted because the decision of the Court below, declining to convene a three-judge Court, is in conflict with the decisions of the Ninth Circuit Court of Appeals in *Dillenburg* v. *Kramer*, 469 F.2d 1222 (1972), the Supreme Court of California in *Serrano* v. *Priest*, 487 P.2d 1241 (1971) and this Court in *Gibson* v. *Berryhill*, —— U.S. ——, 41 U.S.L.W. 4576 (May 7, 1973).

The Court below ruled that the entry of an order of summary affirmance by this Court in *Romero* v. *Hodgson*, 403 U.S. 901 (1971), absolutely precluded the lower federal judiciary from entertaining the contentions of migrant agricultural workers that their systematic exclusion from virtually all ameliorative social legislation denies them the Equal Protection of the laws. In ascribing so drastic a set of legal consequences to the order of summary affirmance in *Romero*, the Second Circuit was in conscious and explicit disagreement with the Ninth Circuit which has ruled in *Dillenburg* v. *Kramer*, 469 F.2d 1222 (1972) that the summary affirmance by this Court of a case within its "obligatory appellate jurisdiction has very little precedential significance." 469 F.2d at 1225. See also, *Serrano* v. *Priest*, 487 P.2d 1241, 1264 n. 35 (1971).

As Mr. Justice White noted for this Court in *Gibson* v. *Berryhill*, —— U.S. ——, 41 U.S.L.W. 4576, 4580 (May 7, 1973), summary affirmances by this Court are frequently "somewhat opaque." Yet the Court below dismissed a constitutional claim, which it suggested was otherwise sub-

stantial, with no more explicit guidance from this Court than an "opaque" order of summary affirmance in *Romero* v. *Hodgson, supra.* Such orders of summary affirmance cannot command such drastic results.

Since this Court enters literally hundreds of orders of summary affirmance each term, it should grant certiorari in order to resolve the conflict between the decision of the Court below and the decision of the Ninth Circuit in *Dillenburg* v. *Kramer, supra,* and to provide guidance to the lower courts on a recurring practical problem in the administration of justice.

2.

Certiorari should be granted because the decision of the Court below ascribed overbroad significance to the entry by this Court of an order of summary affirmance.

Since the enactment of the Judges' Bill in 1925, the vast bulk of this Court's docket has been regulated by the discretionary grant or denial of certiorari. Thus, the most recent statistics indicate that, of the 4,371 cases filed with this Court during the 1971 Term, 91.7 percent were certiorari cases, while only 8.3 percent fell within the Court's obligatory appeal jurisdiction. *Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court,* A. 11 (December 1972) [hereafter cited as *Study Group*]. Moreover, since 1927, this Court has required litigants invoking its appellate jurisdiction to file a Jurisdictional Statement, similar to a Petition for Certiorari, requesting plenary consideration of an appeal. The vast bulk of such appeals are disposed of in summary fashion on the basis of the Jurisdictional Statement without plenary consideration of their merits. Thus, in the 1971 Term of the

Court, 82 percent of the Court's appellate docket was disposed of summarily. *Study Group*, A. 10.

While this Court's summary disposition of an application for certiorari is universally recognized as having no *stare decisis* impact, considerable controversy has arisen over the *stare decisis* impact of the summary disposition of an appeal. Compare, *Dillenburg* v. *Kramer*, 409 F.2d 1222 (9th Cir. 1972) and *Serrano* v. *Priest*, 5 Cal. 2d 584, 615-618, 487 P.2d 1241, 1263-1264 (1971), with the decision of the court below.

As the *Study Group on the Caseload of the Supreme* Court has noted:

> "In theory, in passing upon a jurisdictional statement on appeal, the Court addresses itself to the substantive issues presented and not merely to whether the case is worthy of further review. But, in view of the great number of cases now reaching the Court, and the little time available for each, the disposition of most appeals on a summary basis is not a satisfactory equivalent for the judgment on the merits it is supposed to be. *Study Group*, p. 26.

The apparent functional similarity between the Court's certiorari practice and its summary appeal practice has rendered it increasingly difficult to justify ascribing dramatic precedential significance to one set of determinations, while recognizing that the functionally similar certiorari determination is without precedential effect. Willey, *Jurisdictional Statement on Appeals to U.S. Supreme Court*, 31 A.B.A.J. 239 (1945).

When Professor Hart published his critique of the Supreme Court in 1959,[8] he expressed dismay at the physical inability of the Court to devote sufficient consideration to the summary disposition of its appellate docket.[9] In the years which followed, the time pressures on the Court have increased tremendously. What seemed to Professor Hart an insuperable burden in 1958, the disposition of 1,819 new cases, has risen to 3,651 new cases during the 1971 Term of the Court. Indeed, since *The Time Chart of the Justices* was published, the size of the Supreme Court's docket has more than doubled.

Thus, regardless of the Court's undoubted desire to respect the Congressional delineation of its obligatory jurisdiction, the sheer weight of the Court's burgeoning caseload reduces to the merest fiction the notion that a summary adjudication is the precedential equivalent of a plenary determination on the merits. *Study Group, supra,* at pp. 29-30. Of the 253 appeals filed during the 1971 Term, 209 were summarily adjudicated. *Study Group,* p. A. 10. See, generally, Stern & Gressman, *Supreme Court Practice* (4th Ed. 1969) at 194. Given the reality of the process by which summary adjudication is determined, Professor

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[8] Hart, *The Time Chart of the Justices,* 73 Harv. L. Rev. 84 (1959).

[9] As Professor Hart noted a decade ago, when the docket pressures on the Court were substantially less critical:

> "The figures, of course, cannot shake the authority of the formal doctrine that summary adjudications must be respected as precedents. But they do raise a question about the degree of intellectual respect which is due these determinations. Hart, *The Time Chart of the Justices, supra,* at 95.

Currie's observation a decade ago[10] is now, more than ever, an accurate description of a reality imposed by the enormous difficulty in coping with an ever expanding docket. See also, Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1929,* 44 Harv. L. Rev. 1, 14 (1930).

Accordingly, it was improper for the Court below to have ascribed such dramatic precedential significance to this Court's entry of a single order of summary affirmance in a tangentially related case.

3.

Certiorari should be granted because the decision of the Court below misapplied the order of summary affirmance entered by this Court in *Romero* v. *Hodgson*, 403 U.S. 901 (1971).

In *Gibson* v. *Berryhill, supra,* Mr. Justice White noted that the "opaque" nature of an order of summary affirmance dictated caution in its use as a precedent. Unfortunately, the Court below utilized the summary affirmance in *Romero* as a precedent for issues which were clearly not before this Court in *Romero.* Thus, whatever the *stare decisis* effect of *Romero,* it cannot foreclose the presentation of claims not fairly within its ambit.

First, the instant case challenges the systematic and pervasive exclusion of migrant agricultural workers from the five statutes which form the foundation for virtually all

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[10] "It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari." D. Currie, *The Three Judge District Court in Constitutional Litigation,* 32 U. of Chi. L. Rev. 1, 74 fn. 365 (1964).

20th century American employer-employee relationships. Thus, the cumulative impact, both legally and factually, of a conscious societal decision to exclude a discrete segment of the labor force (consisting of members of racial minorities) from critically important ameliorative statutes is crucial to the theory of petitioners' case. In effect, petitioners claim a pattern or practice of unequal treatment cutting across the entire spectrum of American social legislation.

Romero, on the other hand, challenged merely the existence of a single agricultural exclusion from one Federal statute. At no time during the *Romero* litigation was any attempt made to relate the single statute at issue therein to the systematic exclusion of migrant agricultural laborers from the broad range of ameliorative social legislation.

Moreover, *Romero* was litigated on an assumption by all parties that the appropriate standard of judicial review was the highly permissive test articulated by this Court in *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). While such a permissive standard may have been appropriate in testing a narrow exclusion from a single statute in 1970, it is at least a substantial question whether the more stringent tests articulated by this Court in "fundamental rights" cases, or whether the newly enunciated revitalized rational-relationship test, should not be applied in adjudicating petitioners' claim of a "pattern or practice" of systematic discrimination against agricultural laborers.

Thus, whatever its *stare decisis* impact, the summary affirmance in *Romero* is simply not dispositive of the theory of this case. It is a wholly unwarranted ascription of meaning to read *Romero* as foreclosing all claims which, although not actually advanced, could have been advanced in

that case. In sum, there are obvious differences in theory and presentation between *Romero* and the case at bar. Given the inherent difficulty in distilling any meaning whatever from an order of summary affirmance, such difficulty is exacerbated when an attempt is made to dispose of one case by applying to it the summary affirmance of another, in a situation where the two cases differ in scope and theory. The existence of such dramatic differences of scope and theory between *Romero* and the instant matter, compels the conclusion that petitioners here have been deprived of an opportunity to proceed with their claim and to build a factual record as a result of the misapplication of the summary affirmance in *Romero*.

4.

Certiorari should be granted because the systematic exclusion of migrant agricultural workers from ameliorative social legislation raises the most serious constitutional issues which should be explored by the lower courts.

It is generally conceded that but for the misapplication of the summary affirmance in *Romero*, petitioners presented a serious constitutional question to the lower courts which would undoubtedly have warranted the convocation of a three judge court. *Goosby* v. *Osser*, 409 U.S. 512 (1973); *Local Union No. 300, Amalgamated Meat Cutters* v. *McCulloch*, 428 F.2d 396 (5th Cir. 1970).

Although the equal protection doctrine is currently in a state of no little uncertainty,[11] it is clear that petitioners'

[11] See generally, Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); *Frontiero* v. *Richardson*, —— U.S. ——, 41 U.S.L.W. 4609 (May 14,

contentions raise serious questions which should entitle them to an opportunity to build a factual record before a trial court in order to demonstrate the unconstitutionality of the exclusions in question. Surely, *Romero* does not deprive petitioners of an opportunity to rebut and to test by cross-examination the purported legitimate bases for the exclusion of migrants from 20th century social legislation. Petitioners seek nothing more than a day in court and the courts below erred in refusing to allow them an opportunity to prove their case.[12]

CONCLUSION

For the reasons stated above, certiorari should be granted.

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1973); *United States Department of Agriculture* v. *Moreno*, —— U.S. ——, 41 U.S.L.W. 5105 (June 25, 1973).

[12] The refusal, on the basis of *Romero*, to permit petitioners to build a factual record is particularly distressing since *Romero* was submitted on a scant two-page stipulation of facts which does not even begin to reflect the factual basis of petitioners' case.